

THIRD AMENDMENT TO RESTATED AND AMENDED OWNER PARTICIPATION AGREEMENT

THIS THIRD AMENDMENT TO RESTATED AND AMENDED OWNER PARTICIPATION AGREEMENT ("Third Amendment") is dated as of April 26, 2021 and is entered into by and between the CITY OF UPLAND (the "City") and FORD OF UPLAND, LLC, a California liability company ("FOU").

RECITALS

A. City and FOU entered into a Restated and Amended Owner Participation Agreement dated February 8, 2016 (the "OPA"). Capitalized terms used but not defined in this Third Amendment shall have the meaning set forth in the OPA.

B. City and FOU entered into a First Amendment to Restatement and Amended Owner Participation Agreement dated November 27, 2017 (the "First Amendment"). Pursuant to the First Amendment, certain deadlines in the OPA were extended, including the outside date for the "Commencement Date" in the last sentence of Section 301(1) and Section 304 of the OPA.

C. City and FOU entered into a Second Amendment to Restatement and Amended Owner Participation Agreement dated February 25, 2019 (the "Second Amendment"). Pursuant to the Second Amendment, certain deadlines in the OPA were extended, including the outside date for the "Commencement Date" in the last sentence of Section 301(1) and Section 304 of the OPA.

D. FOU contends that it completed construction of the Project in accordance with its obligations under the OPA no later than December 1, 2020, and on December 2, 2020 (the "Requested Release Date"), FOU delivered to the City a request for Release of Construction Covenants (the "Release"), pursuant to Section 212 of the OPA. Pursuant to Section 212 of the OPA, within 10 business days of receipt of the request for the Release, the City was required to provide FOU with a written statement of the reasons the City refused or failed to furnish the Release. The City did not provide any such written statement to FOU within this 10-business-day period.

E. After the expiration of the 10-business-day period provided in Section 212 of the OPA, the City contended that construction of the Project was not yet completed as of the Requested Release Date, in light of that certain currently fenced-off barren area in the corner of the Property (the "Car Wash Area").

F. By separate agreement between FOU and Planet Car Wash, LLC, and with the City's acknowledgement and consent, the Car Wash Area will be developed as a car wash, open to the public (as opposed to only FOU customers) (the "Car Wash Development").

G. The City has requested and FOU has agreed to submit an updated Attachment No. 2 describing and depicting the Project, reflecting the layout of the Car Wash Area on the Property but exclusion of the Car Wash Development from the Project.

H. Aside from the Car Wash Area, the Parties agree that the construction of the Project is complete, and the City shall, upon City Council approval of this Third Amendment, provide the Release of Construction Covenants pursuant to Section 212 of the OPA and in the ordinary course of business.

I. City and FOU wish to further extend the current outside date for the “Commencement Date” in the last sentence of Section 301(1) and Section 304 of the OPA by 180 days, retroactively, from December 31, 2020 to June 29, 2021, pursuant to Section 703 of the OPA, which states that “[t]imes of performance under this Restated Agreement may be extended by mutual written agreement of CITY and OWNER. The City Manager of CITY shall have the authority on behalf of CITY to approve extensions of time not to exceed a cumulative total of one hundred eighty (180) days.” The purpose of this extension is to allow time for FOU to submit an updated Attachment No. 2 describing and depicting the Project, to exclude the Car Wash Development on the Car Wash Area, and so that construction of the Project may be deemed completed, and the City can provide the Release of Construction Covenants to FOU pursuant to Section 212 of the OPA.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual terms, consents and agreement hereinafter set forth, the parties agree as follows:

1. Pursuant to Section 706 of the OPA, and effective upon City Council adoption of a resolution or motion approving this Amendment, FOU agrees to and does hereby waive any claim it may assert against City based on City’s alleged failure to abide by Section 212 of the OPA, as set forth in Recitals D and E above.

2. Attachment No. 2 is hereby removed and replaced with Exhibit A, attached hereto.

3. Section 301. The last sentence of Section 301(1) of the OPA is hereby deleted and the following is hereby substituted in lieu thereof:

“Notwithstanding anything herein to the contrary, if the Project is not fully completed, or the Commencement Date has not been fully established, on or before June 29, 2021, although the CITY at its discretion can extend the Commencement Date if necessary to accommodate unforeseen construction issues, then the CITY shall have no obligations to provide any Financial Assistance to OWNER.”

4. Section 304. Section 304 is hereby deleted and the following is hereby substituted in lieu thereof:

“(§304) Termination of City Financial Assistance.

CITY’s obligation to pay the City Financial Assistance to OWNER shall terminate upon the occurrence of any of the following, whichever is first to occur:

(i) In the event the Project has not been completed according to the requirements of this Restated Agreement, and the Commencement Date has not been fully established in accordance with Section 301 by June 29, 2021;

(ii) The date upon which the total cumulative amount of all City Financial Assistance provided by CITY to OWNER shall equal Two Million Seven Hundred Thousand Dollars \$2,700,000 ("the Maximum Payment Amount"), taking into account all payments made by CITY to OWNER under this Restated Agreement;

(iii) The discontinuation of the Dealership use at and from the Property (and CITY's payment in full of all amounts accrued and owing with respect to all of the full and partial Payment Periods prior to such event or occurrence); or

(iv) The date on which OWNER defaults in complying with any material provision of this Restated Agreement, including but not limited to a default in any of the use restrictions and covenants contained in Section 401 and 402, as to which any applicable cure period referred to in Section 601 hereof has expired."

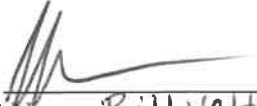
[PARTY SIGNATURES APPEAR ON NEXT PAGE]

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IN WITNESS WHEREOF, the parties hereto have entered into this Third Amendment as of the day and year first above written.

CITY:

CITY OF UPLAND

By: 
Print Name: Bill Vetto
Title: Mayor

Attest: 
Keri Johnson, City Clerk

APPROVED AS TO FORM:

By: 
STEPHEN P. DEUTSCH, City Attorney

FORD OF UPLAND:

FORD OF UPLAND, LLC,
a California limited liability company

By: Engelco, LLC,
a California limited liability company
Its: Managing Member

By: 
Print Name: John Engelhardt
Title: Managing Member

EXHIBIT “A”

ATTACHMENT NO. 2

DESCRIPTION OF PROJECT IMPROVEMENTS

Owner will construct a new state-of-the-art automotive dealership facility consisting of a showroom, office, parts, and service, on the Property as reflected in the attached Site Plan A-10.

